In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Respondent apparently concedes that the court of appeals erred in its central holding that the "color of office" test for removal under 28 U.S.C. 1442(a)(1) is "much narrower" than the standard for determining official immunity from suit under *Barr* v. *Matteo,* 360 U.S. 564 (Resp. Br. 5, 16, 25–26). Nonetheless, respondent contends, the court below properly remanded the instant case to the district court for a factual determination regarding whether petitioners' alleged acts were in fact committed under "color of office" (*id.* at 6–12). This is so, respondent maintains, because the record in his view failed to provide an adequate basis for making such a determination

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(*ibid.*). Respondent's approach, while having some superficial appeal, misses the central point of the case. Accordingly, a short response seems in order.

Respondent's reliance on 28 U.S.C. 1446(a) is misplaced. That procedural provision calls for the filing of "a verified petition containing a short and plain statement of the facts" on the basis of which removal is sought. And that requirement is applicable to federal officers seeking removal of a suit brought against them in a State court. But, as respondent correctly concedes, the statement "giving rise to the right of removal may need to be more elaborate under some circumstances and less so in others" (Resp. Br. 8). The instant situation seems clearly one where an elaborate statement is not required. It is plainly sufficient that petitioners are senior prison officials at Leavenworth Penitentiary; respondent at the relevant times was a prisoner there; the only contact between petitioners and respondent was within the prison walls,[1] and petitioners allege that they were at all times acting within the outer perimeter of their official duties—a fact in any event sufficiently inferable

[1] Respondent notes (Resp. Br. 13) that the express and unchallenged statement of petitioners that their only contact with respondent was within the prison walls appears in their affidavits attached to the motion for summary judgment rather than the removal petition. But even assuming *arguendo* that there was a technical defect in petitioners' pleadings in that regard, it is one which has now been cured, for a court may deem "the petition for removal amended to comport with the proof" (*Buell* v. *Sears, Roebuck & Co.*, 321 F. 2d 468, 470–471 (C.A. 10); *Firemen's Ins. Co.* v. *Robbins Coal Co.*, 288 F. 2d 349, 350 (C.A. 5), certiorari denied, 368 U.S. 875).

for removal purposes from the relationship between respondent and petitioners and the locale of the alleged torts. Further elaborate allegations are not needed in such circumstances. *E.g., Rachel* v. *Georgia,* 342 F. 2d 336, 340 (C.A. 5), affirmed, 384 U.S. 780, 793; *Allman* v. *Hanley,* 302 F. 2d 559, 562 (C.A. 2).

Respondent, however, proceeds to quote at length (Resp. Br. 9–11) from this Court's opinions in *Maryland* v. *Soper,* 270 U.S. 9, and *Colorado* v. *Symes,* 286 U.S. 510, as though those cases were controlling here. But the context of those decisions is substantially different from that in the instant case. Both of those decisions involved attempts to remove State criminal prosecutions of serious offenses for actions allegedly taken at locations other than on federal property. Here, conversely, a civil action was brought against federal officers by a private individual for events allegedly occurring within a federal prison. Respondent attempts simply to brush off those differences as being "immaterial" since Section 1442(a) applies to the removal of both criminal and civil actions (Resp. Br. 11). While the latter statement is of course true, it seems plain that the nature of the suit and the location of the alleged incidents are relevant circumstances in determining how elaborate the statement on which removal is predicated must be. Sound reasons exist for requiring a rather elaborate factual statement where a State criminal prosecution is involved, because of the substantial State interest in the matter, which are not ordinarily present in the case

of a private civil action.[2] As noted above, decisions applying Section 1446(a) in comparable circumstances do not require such elaborate allegations as respondent demands (see *supra,* p. 3). At all events, the crux of the instant case is the interrelationship between the "color of office" test and the "official immunity" standard. This was clearly recognized by both lower courts here, although resolved incorrectly, in our view, by the court of appeals.[3]

As the district court pointed out, the rule pertaining to removal generally is inapplicable "where a defense is asserted based upon a federal right of removal granted under the provisions of 28 U.S.C. § 1442(a)(1) under which removal of this case was sought and obtained" (A. 42). This is so, the district court noted, because "[t]he removal in this case is based on [the] federal interest in the matter, the facts underlying which may be stated in the removal petition itself, and from it determined whether or not federal jurisdiction existed over the claim as stated in the complaint as originally filed and served" (*ibid.*). Quite properly, the district court then immediately referred to the interrelationship between re-

[2] Moreover, in both *Soper* and *Symes* the federal officers had admittedly done *something*, where here there are simply the unsupported allegations of respondent in that regard.

[3] As respondent concedes, the court of appeals never mentioned Section 1446(a) or the requirement thereof on which he now places principal reliance (see Resp. Br. 13). Indeed, the court below expressly stated that "all the requirements of 28 U.S.C. § 1446 were satisfied" (A. 67, n. 2). Respondent also admits, it should be noted, that the "color of office" test for removal and the "official immunity" standard are "obviously interrelated" (Resp. Br. 19).

moval and immunity from suit which is necessarily involved in this sort of situation by stating (*id.* at 42–43):

> Where a federal officer asserts a privilege for acts done under color of his office, the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. *Barr* v. *Matteo,* 360 U.S. 564.

Similarly, the court of appeals' entire opinion dealt with whether "the trial court erroneously equated the standards which govern common law immunity with those which determine the statutory eligibility for removal of an action commenced in a state court" (A. 69). Thus, the potential existence of official immunity was an operative fact which colored the lengths to which petitioners were required to go in providing factual support for their removal petition.[4]

[4] As the district court noted, petitioners pointed out that they were, at all times pertinent to respondent's allegations, the warden and chief medical officer of the federal prison where respondent was confined, that the only contact they had with respondent was within the prison walls, and that "any act or thing that [they] may have done or authorized to be done concerning [respondent] as is alleged in his complaint, was done and made by them in the course of their duties as officers of the United States * * *" (A. 41). While respondent objects to this formulation as "conclusionary," and takes the position that it provided an inadequate basis for the district court to resolve the removal issue (Resp. Br. 4), it seems plain that, considering all the circumstances here, the district court had sufficient information on which to predicate the granting of the removal petition.

Respondent not only contends that the district court was inadequately apprised of the facts to decide the removal issue. He further asserts that petitioners err in construing the decisions below as requiring an extensive factual hearing on the removal question (Resp. Br. 17–18). Of course it is true that the court of appeals remanded for a "factual determination," and not in terms a hearing, as respondent points out (*id.* at 18). But, were respondent's approach adopted, a hearing would, as a practical matter, be almost inescapably required. Respondent suggests that affidavits might simply be filed which would contain "a plain, short statement of the facts of the alleged incidents" and which would indicate "their causal relationship to the authority [the officers] exercise under 'color of office'" (*ibid.*).[5] But, at least with respect to high-ranking officials such as petitioners, the matter is hardly so simple. The likelihood that the warden or senior doctor at a large prison[6] would recall certain alleged incidents relating to one prisoner, sometimes in the rather distant past, is remote. Similarly, such an individual can hardly be expected to recall what he

[5] The fact is that affidavits were actually filed by petitioners here (see A. 44–48), although not until after the district court had determined that removal was proper and was considering whether dismissal under *Barr* v. *Matteo* was appropriate (but see note 1, *supra*). Nonetheless, they were before the court of appeals. However, an examination of those affidavits discloses that they would in all likelihood be insufficient under the standard respondent would require.

[6] As the record shows, Leavenworth houses more than 2,000 prisoners (see A. 45).

did or did not do on a particular day in the past.[7] Thus, as a practical matter, the most that might be expected is that such a person could state, in conclusory fashion, that he did not do what the complainant had alleged he had done. Here, for example, about all that the defendant prison officials could do would be to reiterate the general denial to respondent's allegations which was contained in the answer they filed in the State court (see A. 40, 51). That, however, would be insufficient under the standard respondent would apply, since, in reply, he would presumably simply reaffirm his factual allegations (see A. 31–32). Removal of actions like the instant one would thus be prevented in virtually every case without the holding of an evidentiary hearing to resolve the controverted allegations. This, of course, would amount to a trial on the merits, and, as discussed in our principal brief, would clearly defeat the purposes of both the removal statute and the doctrine of *Barr* v. *Matteo*. On the other hand, the federal official cannot be required either to admit the allegations of the complaint or submit to a full trial on the merits in order to remove a case under 28 U.S.C. 1442(a)(1). As this Court stated in *Maryland* v. *Soper, supra,* 270 U.S. at 33, "It is enough that his acts or *his presence at the place in performance of his official duty* constitute the basis, though mistaken or false, of the state prosecution" (emphasis added).

[7] In any event, respondent's complaint specified only the initial date on which the alleged incidents occurred, and that date was followed by a phrase such as "and on numerous and divers subsequent dates" in each count (see A. 11–15).

Certainly the district court was entitled to take into account the nature of the positions held by petitioners here. It would present an insurmountable practical problem for senior prison officials such as petitioners to be required to make detailed statements of what they did on a given day and to expect them to relate the details of all possible contacts with one of the thousands of prisoners incarcerated there. As to them, at least, it was enough to refer to their offices and state that the only contact they had with respondent was within the prison walls in the performance of their official duties and that "the acts complained of were [done] solely under color of their respective offices and within the scope of their authority" (A. 9). Should the contrary position be adopted, then the only way to determine whether cases should be removed would be to conduct detailed hearings and thus require the extensive litigation on the threshold issue of removal which Congress never intended and which would go a long way toward undermining the essential thrust of the "official immunity" doctrine in cases brought against federal officers in State courts.[8]

Two other points in respondent's brief warrant passing mention. He noted that several of his interrogatories served on petitioner Willingham "seem to

[8] That the immunity doctrine also applies in State courts, as respondent points out (Resp. Br. 26–27), is hardly a sufficient answer. Reliance on that consideration would be tantamount to requiring federal officers to waive their statutory right to remove to a federal forum in order to avoid the harassing and time-consuming litigation from which the immunity doctrine purports to protect them (see *id.* at 20–22).

imply that [he] may *not* have been acting as warden at the time of the alleged incidents" (Resp. Br. 15; see *id.* at 4). Initially, the verified removal petition stated that Willingham was, "at all times" relevant to respondent's charges, acting in his official capacity as warden (A. 6).[9] It is moreover difficult to perceive how a federal officer can reasonably be expected to choose from among some 59 interrogatories, evidently directed toward the merits, those which he should selectively answer since they might conceivably bear some relationship to the threshold issue of removal.[10] And the amount of time that petitioner Willingham would necessarily have consumed in answering all of these interrogatories would, at the removal stage, have been vexatious in itself and thus inconsistent with the rationale of *Barr* v. *Matteo*.

In concluding respondent suggests that, because the record before this Court is a meager one, it would be appropriate for the Court to refrain from a decision on the relationship between the immunity doctrine and the "color of office" test for removal. This submission is premised on the assertion that, while the case is one "of first impression" (Resp. Br. 4), it "comes before this Court on a record almost completely devoid of facts" (*id.* at 27). It is petitioners' view, however, that the instant record contains an adequate portrayal of the factual circumstances so

[9] See also *United States* v. *Classic*, 313 U.S. 299, 326.

[10] Moreover, respondent concedes that the main thrust of these interrogatories was to ascertain the identity of the 75 "Doe" and "Roe" defendants (Resp. Br. 15, n. 13; see A. 30–32).

that the Court should not only correct the court of appeals' error in holding that the "color of office" test is "much narrower" than the "official immunity" standard (A. 70), but has ample basis for reinstating the district court's holding that the record justifies removal. Determining the relative reach of the two concepts would not appear to require an extensive record in any event, and this case squarely presents, and necessarily involves, the question of the interplay between the two concepts. Respondent's suggested approach of avoiding that issue thus seeks to bypass the central thrust of the decision below—which he concedes is indefensible [11]—and only introduces confusion where none should exist while ig-

[11] Respondent refers to the court of appeals as having committed a "fundamental error" in "attempt[ing] to juxtapose these two concepts and to define the respective limits of each," and suggests that "[t]he better approach would be to determine questions of removability and of official immunity separately—each on the merits of the individual case" (Resp. Br. 26). Of course these two concepts are often inextricably bound together in a single case, as here, and simply do not admit of being treated separately. Moreover, the resolution of one has at least a potential impact on the premises underlying the other, as we have sought to point out. Since respondent agrees that the court below erred in this regard, and that the difference in origin of the two concepts is not determinative as to their scope (see *id.* at 5), it is difficult to understand the significance of his extensive comparative discussion of the two concepts (see *id.* at 19–26). At all events, we of course agree with the statement in one of the concluding paragraphs of that discussion to the effect that "[i]t is difficult to conceive of a case involving official immunity where there would not also be the right of removal under the 'color of office' test" (*id.* at 26).

noring considerations essential to the proper resolution of the instant controversy.[12]

Respectfully submitted.

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[12] For example, if the case were remanded to the district court for further proceedings on the removal question, as respondent urges, it would be essential to know whether petitioners would be required to make a showing going beyond that required to establish their immunity from suit. In effect, respondent would have this Court remand for a hearing in which petitioners would be required to go beyond a showing of their immunity from suit, notwithstanding the conceded error of that view. Unless this Court decides the issue, the district court—and all other districts courts in the Tenth Circuit in future cases—would be bound to follow a standard which respondent himself acknowledges is indefensible.

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